IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 43

HARRY BRAVERMAN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONER.

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OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 607-614) is reported in 125 F. (2d) 283.

JURISDICTION.

The jurisdiction of this court is invoked under Judicial Code, § 248a, as amended by the Act of February 13, 1925; 28 U. S. C. A., § 347a.

The judgment of the Circuit Court of Appeals was entered on January 14, 1942 (R. 607).

Petitioner's application for a rehearing was denied on March 2, 1942 (R. 614).

This court granted *certiorari* April 14, 1942 (R. 615).

QUESTION PRESENTED.

The question presented is whether—without violating the provisions of the Fifth Amendment to the Constitution of the United States—an offense which is treated *for purposes of the trial* as having been, in fact, one continuous conspiracy having differing purposes, can, *for the purpose of inflicting sentence*, be arbitrarily split according to the number of its alleged purposes and severed into separate conspiracies.

STATUTE INVOLVED.

Section 37 of the Criminal Code (18 U. S. C. A. 88) reads: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000 or imprisoned not more than two years, or both."

STATEMENT OF THE CASE.

In the District Court for the Eastern District of Michigan petitioner Braverman, and others, were indicted for the crime of conspiracy (R. 1-3). The indictment was divided into seven counts; the allegations of each count were alike as to parties, time and places of entry into, and duration of, the conspiracy. Each count, however, charged as an object of the conspiracy the violation of a separate statute, viz.: (Count 1—R. 1-6) unlawfully *to carry on the business of wholesale and retail liquor dealers* without having the special occupational tax stamp as required by law; (Count 2—R. 6-10) unlawfully *to possess distilled spirits*, the immediate containers thereof not having affixed thereunto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal rev-

enue taxes imposed on such spirits; (Count 3—R. 10-13) unlawfully *to transport large quantities of distilled spirits*, the immediate containers not having affixed thereunto the required stamps; (Count 4—R. 13-15) unlawfully *to carry on the business of distillers* without having given bond as required by law; (Count 5—R. 15-18) unlawfully *to remove, deposit and conceal* distilled spirits in respect whereof a tax was imposed by law with intent to defraud the United States of such tax; (Count 6—R. 18-20) unlawfully to set up and possess, *keep in custody*, and control, unregistered stills and distilling apparatus; and (Count 7—R. 21-23) unlawfully *to make and ferment mash* fit for the production of distilled spirits on unauthorized premises.

It is indisputable that beginning with the opening of the trial, and continuing throughout, both the District Attorney and the trial judge regarded the offense involved as, in fact, one continuous conspiracy having seven differing purposes.* The court declined to charge the jury on the theory of seven separate *agreements* or *conspiracies*.

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* "The Government claims in this case that this was a continuing conspiracy. It started back at the time alleged in the indictment and continued down for several years."—(Charge to jury: R. 573.) (See also, R. 585, 586.)

* * * * *

The Court: Well, let's settle that. That is an extravagant statement. You claim there are seven conspiracies

Mr. Frederick (Petitioner's counsel): Set up in seven separate counts. Each count sets up a conspiracy, yes, your Honor, seven counts. Each count sets up a conspiracy.

The Court (To the District Attorney): Is that right?

Mr. Hopping (Assistant District Attorney): I would not say that that was, your Honor. It is one count—

The Court: Well, never mind.

Mr. Hopping: One conspiracy indictment and seven counts charging seven illegal objects of the conspiracy.—(Colloquy between court and counsel. R. 247.)

* * * * *

The Court: * * Now, do I understand that each separate conspiracy has reference, first, to manufacture, to transportation, to failure to pay tax, and others?

Mr. Hopping: Yes, your Honor, those are the separate illegal objects, alleged as to the objects of this conspiracy.

The Court: *I want to hear you on the law as to what right you have to separate all of these, when, as a matter of fact in my judgment, you call it one conspiracy.* (Italics ours.) (R. 426.)

* * * * *

Mr. Hopping (Assistant District Attorney): *The conspiracy is one as to time and place, and as to all the parties named in the indictment. That is our theory.* (Italics ours.) (R. 428.)

There were pleas of guilty by some defendants who testified for the government (R. 48, 75). Five defendants (including this petitioner) to the conspiracy indictment, and a sixth defendant to a separate indictment (consolidated for trial) were tried. In the case of that indictment consolidated for trial with the one at bar, the defendant therein (Klein) was found guilty (R. 35); in the case at bar, the jury returned the verdict of guilty as to three defendants, one of them this petitioner, and disagreed as to the other two defendants (R. 35).

The trial judge imposed a *general* sentence on petitioner of *eight years in the penitentiary* and fined him $2,000 (R. 33).

We again emphasize, this case was tried, evidence admitted, and the jury charged by the trial judge on the basis that the offense for which the defendants were tried was one conspiracy continuous in character, extending from late 1935 to September of 1939 (R. 573). It was contended that the various defendants had attached themselves to and participated in the conspiracy from time to time during that period. Instructions which would have submitted the theory of seven separate offenses were refused (R. 33). There was *no claim* on the part of the government that there were in fact seven separate agreements or conspiracies—save and except as it was claimed by the District Attorney, that, *as a matter of law*, the proposed violation of several different statutes in the furtherance of one conspiracy, transformed the crime into separate conspiracies punishable as such (R. 248, 428).

The Circuit Court of Appeals accepted the District Attorney's conception of the law. The court held, that, as a matter of law, the presence of several purposes will make separate offenses, punishable as such, out of what was, in fact, only one conspiracy and, as this petitioner contends, but one crime. This is a view of the law contrary

to decisions of the Second, Fourth, Fifth and Seventh Circuits. It is contrary, furthermore, to the historical conception of the crime of conspiracy. The question was appropriately raised on the record in the trial court by motions to elect made at the opening of the trial, renewed at the close of the government's case, renewed again at the close of all of the evidence, by requested instructions, and, in the Circuit Court of Appeals, by appropriate assignments of error (R. 47, 29, 420, 600).

Aside from the question of law here presented, the substantial facts do not justify the infliction of a sentence of the severity here involved.

In the late Fall of 1935, two men, Skampo and Dracka, both of whom pleaded guilty and testified for the government, had been partners in the operation of an illicit still located near Romulus, Michigan (R. 48). In the latter part of 1935 Braverman had some conversations with Skampo at Detroit, Michigan (R. 50, 51). Skampo testified that it was agreed between them that Braverman would ship alcohol in 5-gal. containers from Chicago, Illinois, to Detroit, Michigan, to Skampo, where it would be disposed of by Skampo and the money remitted to Braverman (R. 51, 52). Shipments were made in wood crates via motor express trucks operating between Chicago, Illinois, and Detroit, Michigan (R. 52). The names of the consignor and consignees were fictitious (R. 65-66). The evidence showed that over a period of about six to eight weeks, all told there were about ten to twelve such shipments from Braverman (R. 54). The last shipment by Braverman was January 30, 1936 (R. 66).

At this point Braverman ceased shipments and notified Skampo that he was "quitting business" (R. 54, 66, 267). Both Skampo and Dracka, witnesses for the government, testified positively to this effect (R. 54, 66, 267). Between January of 1936 and November of 1939 neither Skampo

nor Dracka dealt with Braverman or with anyone who purported to represent Braverman (R. 66, 97).

The substantial evidence in the case, subsequent to January, 1936, is consistent with and corroborates the conclusion that Braverman did actually quit the business at that point. No shipments after the latter part of January, 1936, were shown to have originated with Braverman in any way, shape or form (R. 97).

In November of 1936 Skampo and Dracka left Detroit and went to Chicago in order to carry on their business from that point (R. 57, 58, 83). They carried on their business from a warehouse building in Chicago from November, 1936 until May, 1937 (R. 91). Then Skampo and Dracka returned to Detroit (R. 91).

In January, 1938, one Al Johnson—a defendant who was not apprehended and tried—went to Detroit, interviewed Dracka and arranged to obtain from Skampo and Dracka the tools and equipment located in the Chicago warehouse building and necessary to carry on the business (R. 93). Johnson appears to have carried on the business up to September of 1939, making shipments from Chicago, Illinois, to Cleveland, Ohio.

During all this period—from about the latter part of January, 1936, throughout the balance of the term of the alleged conspiracy—Braverman not only had nothing to do with the operation of the conspiracy but—according to the government's own evidence—had actually withdrawn from the conspiracy at the time stated.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in affirming the judgment of conviction and the sentence of eight years thereupon.

2. The Circuit Court of Appeals erred in affirming a sentence of eight years for seven separate offenses, when the case was tried to the jury as one involving a single, continuous conspiracy.

SUMMARY OF ARGUMENT.

1. It is well settled that the *gist* or *gravamen* of the crime of conspiracy consists in the agreement; that one conspiracy does not become several, because it may incidentally involve the violation of several statutes. (*Post*, pp. 8-10, 13-18.)

2. The Circuit Court of Appeals failed to appreciate that in the case at bar both the Government and the trial court treated and tried the case as that involving a *single, continuing conspiracy;* that the *offense* was therefore *unitary,* notwithstanding it may have had several purposes. (*Post*, pp. 10-13.)

3. The Circuit Court's application of the *Blockburger* and *Albrecht* cases was, in this case, erroneous, because where, as here, the conspiracy was conceded to be single and continuous, then proof showing more than one purpose does not supply proof of *different* and *separate* offenses, but instead, cumulates proof showing the nature of the objective. (*Post*, pp. 12-13.)

4. The imposition of a sentence of *eight years* on the theory of seven separate offenses, was contrary to that theory upon which the case was submitted to the jury, amounts to an unconstitutional "splitting" of the offense for purposes of punishment, and sentences this petitioner on a theory of culpability for which he was never tried. (*Post*, p. 21.)

ARGUMENT.

I.

GENERAL PRINCIPLES OF THE LAW OF CONSPIRACY.

While the general principles of law applicable to the federal offense of conspiracy are well settled, their restatement here will be beneficial as a background for the point we wish to present.

A conspiracy is the partnership of two or more persons by concert of action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Pettibone* v. *United States*, 148 U. S. 197, 203; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 465. The gist of the crime is the confederation or combination of minds. *United States* v. *Hirsch*, 100 U. S. 33, 34. The statement: "the *gist* of the crime is the confederation or combination of minds," has been repeated time and again in opinions dealing with this offense. It is very important in this particular case. The offense of conspiracy may, of course, be established by inferences drawn from evidence circumstantial in character. *Johnson* v. *United States*, 82 F. (2d) 500, 504.

A conspiracy formed for the purpose of committing an offense, is a crime *entirely separate and distinct from the substantive offense itself*. *Ford* v. *United States*, 273 U. S. 593, 619; *Clune* v. *United States*, 159 U. S. 590, 595. Under the national statute the crime of conspiracy is complete, when an overt act, calculated to effect the object of the conspiracy, is done by at least one of the conspirators. *United States* v. *Hirsch*, 100 U. S. 33, 34. Proof of the overt act is required, not to show the unlawful agreement, but to show that the unlawful agreement, while subsisting,

became operative. *United States* v. *Donau*, 11 Blatchf. 168, 25 Fed. Cas. 890. The overt act need not be a criminal act, nor need it be the very crime that is the object of the conspiracy. *United States* v. *Rabinowich*, 238 U. S. 78, 86. All of the conspirators need not join in the commission of an overt act, because, in contemplation of law, the act of one is the act of all. *Logan* v. *United States*, 144 U. S. 263, 308.

The conspiracy indictment need only identify the *general nature* of the offense to be committed. *Wong Tai* v. *United States*, 273 U. S. 77, 81. It is immaterial whether the purpose to be achieved by the unlawful conspiracy is single or several, or whether the purpose be ever achieved. *Williamson* v. *United States*, 207 U. S. 425, 447; *Goldman* v. *United States*, 245 U. S. 474, 477; *Heskett* v. *United States* (C. C. A. 9) 58 F. (2d) 897, 902 (*cert. denied*, 287 U. S. 643). Finally, a conspiracy to commit several offenses against the United States is sustained by proof of a conspiracy to commit any one of such offenses. *Kepl* v. *United States* (C. C. A. 9) 299 Fed. 590, 591.

When the unlawful agreement contemplates bringing to pass a continuous result requiring continuous cooperation of the conspirators, the conspiracy is said to be continuing, but is nevertheless single. *United States* v. *Kissell*, 218 U. S. 601, 607; *Brown* v. *Elliott*, 225 U. S. 392, 400. In *Ford* v. *United States*, 273 U. S. 593, 602, an indictment charged in one count a continuous conspiracy to violate *two laws* relating to the importation of intoxicating liquor into the United States. In rejecting defendant's contention that the indictment was duplicitous, this court said:

> "The charge *is unitary* in relating to one continuous conspiracy, although in proof of it different circumstances constituting it and overt acts in pursuance of it are disclosed."

These general principles found ready acceptance in the court below. Some of them are referred to in the opinion.

It is with respect to the significance to be accorded, *as a matter of law*, to the purpose or purposes of an unlawful partnership that the court below fell into error. The court held, in substance, that even where the government relies upon one conspiracy, continuous in character, the presence of several unlawful purposes will, *ipso facto*, make several punishable conspiracies out of it. This, it is respectfully submitted, is a mistaken view of the law and an unconstitutional splitting of the offense. It punishes the petitioner on the erroneous conclusion of law that he is guilty of seven offenses instead of one.

II.

THE CIRCUIT COURT FAILED TO APPRECIATE THAT THE OFFENSE OF CONSPIRACY CONSISTS IN THE AGREEMENT.

Ever since the Ordinance of Conspirators, 33 Edw. I. (1305), the gist of the offense of conspiracy has consisted in the confederation or alliance of minds to effect some unlawful objective. The old and new statutes alike undertook to frustrate *evil intents* and therefore interdicted the gathering together of minds to effectuate such intents. It is the *agreement* that is the core of the crime and against which the national conspiracy statute is directed.*

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* The present conspiracy statute (18 U. S. C. 88) originated as Section 30 of an Act entitled "An Act to amend existing laws relating to Internal Revenue and for other purposes," approved March 2, 1867 (14 Stat. 471, 484, c. 169).

On June 27, 1866 (14 Stat. 74, c. 140) a commission was appointed to revise and consolidate the statute laws of the United States. That commission was not authorized to make any changes in the law as it stood, but only to alter the existing text so far as necessary to make clear the intention of Congress.

The commission reported in 1873, took the conspiracy provision out of the special class of revenue legislation, and placed it under a chapter, entitled, "Crimes against the Operations of the Government," as an independent section (5440) of the revision. The revisions in the text were purely formal.

As the law stood after the 1873 revision it provided that "all the parties to such conspiracy shall be liable to a penalty of *not less* than one thou-

In examining into the question of double jeopardy, this court has held that, in order to ascertain whether the same act or transaction constitutes a violation of *two distinct statutes*, the test to be applied, is to ascertain whether each statutory provision requires proof of a fact which the other does not. *Gavieres* v. *United States*, 220 U. S. 338, 342; *Blockburger* v. *United States*, 284 U. S. 299, 304. The Sixth Circuit Court of Appeals borrowed that principle of law from these substantive offense cases, and held that each count was separately punishable (R. 611).

There are two major fallacies in the court's decision.

First: The court overlooks the proposition that in the case of the crime of conspiracy, the *gist* of the offense consists in the *agreement*, and not in the *purpose*. Unless it be claimed—*and we emphasize again that such was not the case on this record*—that there were *separate agreements* for such purposes, separately reached or arrived at, the conspiracy is still single and not several, however multifarious the purpose. "The crime of conspiracy is not to be confounded with the objects of the conspiracy." *State* v. *Profita*, 114 N. J. L. 334, 338, 176 A. 683, 685. *Brown* v. *State*, 130 Fla. 479, 486.

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sand dollars and *not more* than ten thousand dollars *and* to imprisonment for not more than two years.

In 1879 the conspiracy statute was amended and on this occasion its punishment provisions were ameliorated.

By an Act approved May 17, 1879 (21 Stat. 4, c. 8), section 5440 was amended so as to provide for a fine of *not more* than ten thousand dollars, or imprisonment for *not more* than two years, or both, in the discretion of the court, *in lieu of the cumulative punishment provided for in the original section.*

As explained to Congress by the proponents of the bill, the original provision for a fine of *not less* than one thousand dollars was regarded as too great for conspiracies involving the commission of trivial substantive offenses. (See remarks of Congressman Herbert, Cong. Rec., House Proceedings April 30, 1879, at p. 908, Cong. Rec., 46th Cong., 1st Sess., and remarks of Senator Lamar, Senate Proceedings May 14, 1879, at p. 1315, Cong. Rec., 46th Cong., 1st Sess.

"The amendment is deemed to be needful in order to enable the court to adapt the punishment to the measure of the offense described in the statutes, many of which are small and trivial"—Senator Lamar.

Second: The cases cited are inapplicable for the reason, that where, as in this case, the Government relied upon one conspiracy or agreement continuous in character (R. 275, 470), adding, to proof of the first unlawful purpose, proof showing a second, third, fourth, fifth, sixth and seventh, *does not,* as the court decides, supply *differing elements* of differing *offenses,* but merely *cumulates the proof* on *one element* of the *original offense.* The additional proof buttresses the case on *one element* of the crime (*i. e.,* its object) and that is all it does. The matters to be proved in the federal crime of conspiracy are: (1) the agreement; (2) the nature of its purpose or objective; and (3) the overt act. When due proof has been made of one unlawful purpose, proof of the offense of conspiracy (assuming, of course, proof showing the agreement and the overt act) is then complete. Further proof of further purposes—there being no proof or contention of separate agreements—affects the case quantitatively and not qualitatively merely by increasing the quantum of proof on one feature of the crime.

As a matter of the civil law, if at a meeting *A* and *B* agree to form a partnership to sell (1) groceries, and (2) securities, and (3) automobiles, would anyone say that the agreement to sell three different classes of commodities constituted three separate and independent partnerships? The question answers itself. The principle operates in like manner in the case at bar, for, in many of its major aspects, the law of criminal conspiracy is the law of partnership transferred to the purposes of a criminal case. Therefore, if *A* and *B* agreed together for the operation of a still, purchase and sale of alcohol, without the requisite stamps, licenses, etc., and implied or arranged for in that understanding when it was made were all the phases of transportation and operation counted on in this indictment, the original agreement constituted the single

offense of conspiracy when it was reached and when the first overt act thereunder took place—it remained so thereafter and is punishable only as such.

The question presented in the case at bar is not like that presented in the *Blockburger* and *Albrecht* cases, but is more nearly like that presented in cases involving larcenies. There it has been uniformly held that where several articles of property are stolen *at one and the same time* and at the same place, from several separate owners, while there may be as many *private* wrongs committed against private citizens as there were separate owners, as against the public such act was but *one offense or crime*. Cf. *People* v. *Israel*, 269 Ill. 284, 287; *Waters* v. *People*, 104 Ill. 544, 547; *State* v. *Emery*, 68 Vt. 109, 34 A. 432; *State* v. *Sampson*, 157 Iowa 257, 138 N. W. 473.

III.

IT HAS BEEN THE SETTLED RULE THAT MULTIPLICITY OF PURPOSES IN A CONSPIRACY DOES NOT CREATE SEVERAL CONSPIRACIES.

It has been settled by a number of decisions that a multiplicity of purposes in a conspiracy will not make a single conspiracy several.

In the case of *Frohwerk* v. *United States*, 249 U. S. 204, 210, the defendant advanced the contention, that inasmuch as the first count of the indictment there involved had attributed a multiplicity of purposes to the conspiracy charged, the count was duplicitous. Mr. Justice Holmes disposed of that contention in these words (p. 210):

> "The conspiracy is the crime and that is one, however diverse its objects."

In the case of *United States* v. *Manton* (C. C. A. 2), 107 F. (2d) 834, 838, the appellant contended that the

conspiracy count, stating many purposes to the conspiracy, was, for that reason, duplicitous. The court said:

> "The conspiracy constitutes the offense *irrespective of the number or variety of objects which the conspiracy seeks to attain*, or whether any of the ultimate objects be attained or not." (Italics ours.)

The case of *Short* v. *United States* (C. C. A. 4) 91 F. (2d) 614, 622, was a conspiracy case involving the violation of a number of the Internal Revenue statutes. An extract from page 622 of the opinion illustrates the rule prevailing in the Fourth Circuit and is precisely in point:

> "*It is to be noted that the rule in case of prosecution for conspiracy to violate statutes is different from the rule applicable in prosecutions for violation of the statutes themselves.* In the latter case, in the absence of circumstances giving rise to the doctrine of merger, there may be a separate prosecution for each of the statutes violated without any splitting of offenses; for each of the statutory crimes involves a different element. *In the case of conspiracy, however, the gist of the crime is the unlawful agreement, or partnership in criminal purposes thereby created;* and one conspiracy does not become several because it may incidentally involve the violation of several statutes. As said by Judge Grubb, speaking for the Circuit Court of Appeals of the Fifth Circuit in *Norton* v. *United States* (C. C. A. 5th) 295 F. 136, 137: 'The fact that the conspiracy contemplated numerous violations of law as its object does not make the indictment duplicitous. The gist of the offense is the conspiracy, and it is single, though its object is to commit a number of crimes.' And the rule against splitting a conspiracy for purposes of prosecution was thus stated by Judge Lindley in *United States* v. *Weiss* (D. C.) 293 F. 992, 994: 'At the threshold it must be noted that the government cannot split up one conspiracy into different indictments, and prosecute all of them, but that prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the

same crime. *Murphy* v. *U. S.* (C. C. A.) 285 F. 801, 804, at page 816; *In re Snow*, 120 U. S. 274, 7 S. Ct. 556, 30 L. Ed. 658; 16 Corpus Juris, 270, and cases there cited.' ".

In the case of *Powe* v. *United States*, 11 F. (2d) 598, 599, the Fifth Circuit Court of Appeals stated the proposition bluntly. The court said, page 599:

> "The government cannot split up one conspiracy and make several conspiracies out of it."

Two decisions in the Seventh Circuit Court of Appeals are precisely in point. They are peculiarly applicable to the merits of this case, because this petitioner was taken out of the Seventh Circuit, where some of the overt acts complained of in this indictment took place, and tried in the Sixth Circuit, where a rule would seem to prevail which is contrary to that of the Seventh Circuit.

In the case of *Miller* v. *United States* (C. C. A. 7) 4 F. (2d) 228 (*cert. denied*, 268 U. S. 692), Miller was tried and convicted under two indictments, consolidated by agreement for trial. The first indictment contained *two* counts, each charging Miller and others with conspiring to commit an offense against the United States. The second indictment charged the substantive offenses and contained *four* counts: (1) unlawfully removing no-tax-paid alcohol from a government warehouse; (2) aiding and abetting others in such removal; (3) transporting distilled spirits without a permit, and (4) breaking open the lock of a bonded warehouse. Miller was convicted on all counts of both indictments except Count 4 of the second, upon which he was acquitted. His sentence was as follows: Two years and a fine on the first conspiracy count; two years and a fine on the second conspiracy count; three years on Counts 1 and 2 of the second indictment; a fine on Count 3 of the second indictment—the imprisonment terms to run consecutively. The first count of the conspiracy

indictment charged as the object of the conspiracy, the illegal transportation of alcohol; the second count of the conspiracy indictment charged the aiding and abetting in the removal of spirits from a government warehouse, no tax having been paid. It will be observed that two separate purposes were stated in the two separate counts, and it may be assumed that the evidence fully sustained conviction on both counts. The Circuit Court of Appeals eliminated the sentence on Count 1 of the conspiracy indictment and said:

> "It is contended that the two counts are for the same offense, and that in any event the evidence does not warrant separate cumulative penalties under these counts. That there was a conspiracy between Miller and others to steal or aid in stealing and removing from the warehouse this large quantity of alcohol, there is, under the record, no shadow of doubt. Stealing the alcohol naturally involved the seizing of it where it was and transporting it elsewhere. While such acts might be prosecuted and punished separately, if under different statutes defining and penalizing the several acts, *a single conspiracy, if covering the entire transaction, may not be split up into a plurality of offenses. Murphy* v. *United States*, (C. C. A.) 285 F. 801. There was here no proof of a conspiracy, save as it would of necessity be drawn from the concert of action between Miller and the others. In the very nature of things, this would not have occurred without prior understanding and confederation between them as to the purpose and the plan of its execution. A state of facts might appear, showing a conspiracy to remove the alcohol and a separate independent conspiracy to transport it; but there is nothing *in the evidence* which warrants the conclusion that there were here two separate conspiracies—one for Miller to transport industrial alcohol, and the other for Miller to aid and abet in the removal from the warehouse of the alcohol." (Italics ours.)

In the case of *Murphy* v. *United States* (C. C. A. 7) 285 Fed. 801, 817, the court held that in the case of a conspiracy among individuals to rob a mail truck, there could not reasonably be separate convictions for (1) conspiracy to hold up and rob the truck, and (2) conspiracy to have and conceal stolen property, even though two separate substantive offenses were created by those statutes which were severally alleged as the objects of the two conspiracies. In the *Murphy* case the court reached its conclusion on consideration of Murphy's petition for rehearing and modified the sentence inflicted on Murphy accordingly. The court said (p. 817):

> "It may be admitted that separate conspiracies may be thus formed, to effectuate which different plans involving perhaps different conspirators are formulated. We need not decide any such imaginary case, but content ourselves with a decision applicable to the facts in this case. The evidence leaves no room for legitimate discussion. It conclusively establishes but one conspiracy. There was no separate conspiracy to have and to conceal the stolen property, and no evidence tending to show such separate combination.
>
> "*The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test which is a practical, not a theoretical one. It is the evidence, and not the theory of the pleader, to which we must look to determine this issue. And it is needless to add that one accused of crime, regardless of kind or magnitude of the offense, is entitled to the protection of this section of the Constitution. The sentence on this count therefore cannot be sustained.*" (Italics ours.)

In the case of *United States* v. *Anderson* (C. C. A. 7) 101 F. (2d) 325, 333, where this point was raised by the appellants, the court held that though the objects therein complained of might have differed, there was but one conspiracy. The court said (p. 333):

> "This does not mean that both indictments were not

properly pleaded, as a precautionary matter, but we cannot believe that Congress intended to permit the accumulation of sentences upon diverse objects of a conspiracy where there was but one conspiracy and the evidence supporting each was precisely the same."

IV.

CASES REFERRED TO IN OPINION BELOW DISTINGUISHED.

The opinion of the Circuit Court cites and relies upon the following cases: *Blockburger* v. *United States*, 284 U. S. 299, 304; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Parmenter* v. *United States* (C. C. A. 6), 2 F. (2d) 945, 946; *Fleisher* v. *United States* (C. C. A. 6), 91 F. (2d) 404; *Meyers* v. *United States* (C. C. A. 6), 94 F. (2d) 433; *Telman* v. *United States* (C. C. A. 10), 67 F. (2d) 716; *Yenkichi Ito* v. *United States* (C. C. A. 9), 64 F. (2d) 73, 77.

We have already shown why the principle stated in the *Blockburger* and *Albrecht* cases is inapplicable in this particular case. The fundamental inquiry in both the *Blockburger* and *Albrecht* cases was an inquiry into the *nature of the substantive offense as defined by the particular statute or statutes, i. e.,* whether or not Congress *intended* to interdict separately, distinct, though closely connected, steps in a given transaction. Obviously, where it is apparent from the text of the statute that Congress *intended* to punish distinct, though closely connected steps in a given transaction, a single occurrence might well constitute several separate offenses. However, in the light of the text of the federal conspiracy statute and the decisions thereunder since its enactment, there can be no contention that Congress intended to punish a conspiracy according to the number of its purposes.

In the *Parmenter* case (C. C. A. 6), 2 F. (2d) 945, the question of double prosecution and double punishment was suggested to the Sixth Circuit Court by the appellant in

that case. The court, as then constituted, *examined the evidence* in the light of appellant's contention and concluded *from the evidence* that the proof was not "conclusive that the plan to take it [contraband] from the shore to the warehouse was part of the plan to bring it to the shore." (2 F. (2d) 945, 946.) In other words, the court held that on the evidence submitted in that case, the conspiracies for which appellant had been prosecuted and convicted were *in fact* several and not single.

In the *Tetman* case (C. C. A. 10), 67 F. (2d) 716, the question of double punishment seems not to have been suggested by appellant's counsel or considered by the court, and the extent of the sentence does not appear from the reported opinion.

In the *Yenkichi* case (C. C. A. 9), 64 F. (2d) 73, while the question of double punishment was there suggested by the appellant, the Circuit Court of Appeals very properly held that the question was academic, because the sentence inflicted on both counts in that case had been ordered to run *concurrently*. The appellant was therefore not prejudiced.

The decision of the Circuit Court of Appeals in this case, and in the case of *Meyers* v. *United States*, 94 F. (2d) 433, follows and applies earlier observations made by the court in the case of *Fleisher* v. *United States*, 91 F. (2d) 404, 406. As a matter of fact, at the opening of the trial in this case the Assistant District Attorney advised the trial court, in opposition to petitioner's motion to require the Government to elect on what count it would proceed, that: "We are relying upon the authority of the *Fleisher* case in this district" (R. 47).

The *Fleisher* case was a decision in respect of a *pleading only*. No evidence had been preserved and transmitted to the reviewing court. That was highly important because, in the absence of evidence preserved in a record, the court

was obliged, after conviction, *to assume* on review, as it stated in the opinion (p. 496):

> "That testimony was offered showing the existence of four separate conspiracies."

The memorandum for the United States filed in respect of the petition for writ of certiorari in the case at bar suggests (pp. 11-12) additional distinguishing circumstances for the *Fleisher* case based upon an examination of the briefs filed.

The same memorandum refers to decisions in the Circuit Courts of Appeals for the Eighth, Ninth and Tenth Circuits, viz., *Beddow* v. *United States*, 70 F. (2d) 674, 676 (C. C. A. 8); *Thomas* v. *United States*, 156 Fed. 897, 912-913 (C. C. A. 8); *Vlassis* v. *United States*, 3 F. (2d) 905, 906, (C. C. A. 9), and *Piquett* v. *United States*, 81 F. (2d) 75, 78-80.

In the *Beddow* case, aside from a reference to the *Blockburger* and *Albrecht* cases, the reported f[illegible] to suggest a factual basis for regarding the conspiracies charged as consecutive and separate and not continuous and single.

In the *Thomas* case, in the light of the reversal of the conviction for erroneous instructions, the reported discussion was *obiter dictum*.

In the *Vlassis* case the discussion is limited and meager.

In the *Piquett* case the Circuit Court of Appeals believed *the evidence to involve consecutive conspiracies* and not one continuous conspiracy (p. 80).

It is not here contended that a prosecutor may not *plead* as many different conspiracies as he wishes. As the Seventh Circuit Court of Appeals suggests, he may do this "as a precautionary matter." *United States* v. *Anderson*, 103 F. (2d) 325, 333. But the theory of the pleader is not the test.

We submit that the true rule would be this: that whether a given case constitutes a single and continuous conspiracy,

or consecutive and separate conspiracies, is, in each particular case, a question of fact controlled by reference to the number of agreements made, and by what is claimed for the evidence in that respect, and is not controlled by the number of purposes present. See *People* v. *Silverman*, 281 N. Y. 457, 24 N. E. (2d) 124.

We submit further, *that in the instant case*, where the several counts of the indictment were conceded by the Government at the trial to charge the illegal objects of *one continuing conspiracy, that where the proof disclosed but one such conspiracy, that where the case was submitted to the jury on that theory only*, the jury necessarily found *only* that the petitioner was guilty of participation in a single conspiracy. Punishment, therefore, to be lawful, can only be on a basis compatible with the theory of the case as tried.

CONCLUSION.

The judgment of the Circuit Court of Appeals disregards the conception of the case adhered to by the District Attorney and the trial court and affirms the sentence upon the theory of seven separate offenses—which is a theory which was not submitted to the jury and one upon which this petitioner has never been tried. It deprives petitioner of his liberty for a period of time without sanction in the law; it subjects him to double and fourfold punishment for but one offense.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the cause remanded to the District Court for appropriate re-sentence according to law.

Respectfully submitted,

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